82-860

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MATTHEW MADONNA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was petitioner denied due process when the government knowingly utilized the perjured testimony of a crucial witness at trial?

2. Was petitioner entitled to an evidentiary hearing where he specifically delineated an irrefutable factual basis for his claim of intentional governmental use of perjured testimony and the files and records of the case corroborated petitioner's allegations?

3. Was petitioner denied due process where the government failed to disclose the prior sworn testimony of its key witness which contained evidence clearly favorable to petitioner despite a timely request for such disclosure?

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OCTOBER TERM, 1982

MATTHEW MADONNA,

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Petitioner, Matthew Madonna, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 23, 1982.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed the judgment of the United States District Court, Southern District of New York (Carter, J.), which denied, without a hearing, the petition, pursuant to 28 U.S.C. §2255, to vacate the judgment of conviction entered in the United States District Court for the Southern District of New York on December 21, 1976. The District Court's opinion appears in Appendix B.

Matthew Madonna was convicted, following jury trial before the Honorable Robert L. Carter, of one count of conspiring to violate 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 952(a) and of one count of a substantive offense under 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A). He was sentenced to a maximum term of fifteen years' imprisonment on each count, the terms to run consecutively, fined $25,000 on each count, and placed on special parole for a period of three years to commence upon the expiration of confinement. The judgment of conviction was appealed to the United States Court of Appeals for the Second Circuit, which affirmed the conviction on April 4, 1977. *United States* v. *Madonna*, 556 F.2d 562 (2d Cir. 1977). The Supreme Court of the United States denied certiorari on November 14, 1977. 434 U.S. 919 (1977).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 60 days of the denial by the Court of Appeals of petitioner's appeal to that Court.

Constitutional Provisions Involved

U.S. Const. amend. 14. This provision appears as Appendix C to this petition.

Statutory Provisions Involved

18 U.S.C. §3500, 28 U.S.C. §2255, Rule 33 of the F.R. Crim.P., Rule 9(a) of the Rules Governing Proceedings in the United States District Courts Under 28 U.S.C. §2255, N.Y.P.L. §70.00. These provisions appear in Appendix D to this petition.

Statement of the Case

The Madonna Trial

Matthew Madonna was charged in a two count indictment. The first count charged him, together with Salvatore Larca, Joseph Boriello, Joseph Florio and Richard Klinger, with a conspiracy to import and distribute heroin. The second count charged Madonna, together with Larca and Boriello, with a substantive narcotics violation. Boriello and Florio pleaded guilty and agreed to testify for the government. Madonna, Larca and Klinger went to trial.

Boriello arranged for the importation of a quantity of heroin and, after his arrest, he informed the agents he was supposed to deliver the car with the heroin to Larca at 58th Street and Fifth Avenue. After arranging to monitor the delivery, the agents permitted Boriello to proceed to the meeting place. The agents observed Boriello arrive in a red Ford and Larca and Madonna emerge from a restaurant to speak to him. At that time Boriello walked to Larca's automobile and Madonna and Larca approached the red Ford. When Madonna and Larca entered the Ford, they were arrested. (Tr. 224-28, 288-89) Despite the confessions of Boriello, Florio, Travers and Portman, none of them in any way implicated Madonna in the transaction.

In view of the absence of any testimony connecting Madonna to the crime, the District Court held him in the case because of circumstantial evidence alone. The Court summed up that evidence as follows:

> The circumstantial evidence, as I see it, is one, renting the car in a name not his own, the red Grenada, that Grenada being utilized by Mr. Boriello for the supposed transport of the heroin; your taking possession of the car at 58th Street and Fifth Avenue and your rental of the car at a time when the evidence

shows that you had also rented another car and therefore had the use of the car for your purposes, and your presence at Mr. Larca's home at the time when Mr. Boriello made his visit on his return from the trip.

Under those circumstances, it is my finding that a prima facie case has been established.

(Tr. 1746-47)

At trial Madonna did not contest the occurrence of the facts recited by the District Court. Rather he contended the actions and, particularly, the use of the assumed name Paul DeRobertis were not part of narcotics activities but were taken as part of a secret relationship Madonna, a married man, had with a woman named Joy in Altamonte Springs, Florida. As a result of this defense, the only issue in the case was Madonna's intent. The District Court, therefore, permitted the testimony of Nicholas Visceglia as to an alleged prior similar act with Madonna.

Before Visceglia took the stand, counsel for Madonna made an application to the District Court concerning the material supplied by the government in accordance with its obligations under 18 U.S.C. §3500 and *Brady* v. *Maryland*. Counsel for Madonna informed the court that part of the material supplied by the government was Visceglia's arrest record which showed his most recent arrest on July 8, 1975, in the federal district court in Newark, New Jersey, in a case entitled *United States* v. *Levy, Verna, Visceglia et ano.** An investigator sent by defense counsel to inspect the contents of the file was told it had been sealed by the Honorable H. Curtis Meanor, United States District Judge. Defense counsel requested the District Court in New York to contact Judge Meanor to produce the file for *in camera* inspection by the Court. The government made no comment

* Hereinafter this case will be referred to as the Verna-Visceglia case.

with respect to this request, and Judge Carter agreed to get in touch with Judge Meanor. (A. 82)

During a break in the proceedings Judge Carter advised counsel he had contacted Judge Meanor. The following colloquy ensued:

> (At the side bar.)
>
> The Court: I told Judge—Judge Meanor and I had a conversation and as a result of that I told him not to bother with the material.*
>
> What it involves is apparently one of the three defendants—and I don't remember, but one of them was participating in the counsel of the defense, with the lawyers and so forth, when he had agreed to be an informant, and apparently the DEA people hadn't advised the prosecution about that, and Judge Meanor had a hearing on the matter outside the prosecution, to determine whether there was prosecutorial misconduct. And it seems to me that has nothing to do with the issues in this case.
>
> Mr. Alch: Your Honor, was Mr. Viseglie involved in that?
>
> The Court: I don't remember which one was involved.
>
> Mr. Brown: Yes, he was, Judge. I can tell you on information and belief, Mr. Byrne [sic] and Mr. Viseglie had the same counsel. There came a time—
>
> • • •
>
> Mr. Alch: If Mr. Viseglie was in any way accused of invading the camp of his co-defendants, that has a direct bearing on his credibility as a witness for the government.

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* Hereinafter this material, which was comprised of an evidentiary hearing pre-dating the *Madonna* trial, will be referred to as the Verna-Visceglia hearing.

The Court: No. You may, of course, bring that out, but the point is that that has nothing to do with the issue here. The issue here was that it was not Viseglie who did the invasion. Apparently the prosecution had not been advised that the man had agreed to be an informant, and he wasn't acting as a spy. It was careless on the part of the Department.

* * *

Mr. Alch: Wouldn't we have a better position to cross examine, having the documents in hand? We can only speculate, your Honor.

The Court: No, I don't think we are going to have that. As I indicated, that hasn't anything to do with this case. You can ask him about that, if you want to.

As a matter of fact, I am not even sure that he was the person who was involved. I think he was one of the defendants.

* * *

Mr. Alch: It bears upon an event which bears on Mr. Viseglie's cooperation with the government—. What if he denies something that those papers prove? We can't contradict him unless we have the documents.

Mr. Flannery: It is collateral, anyhow.

The Court: If he denies it, I will consider it.

All right, let's go.

(A. 101-104)

After this colloquy Visceglia testified at the Madonna trial that he had a series of meetings with Madonna and his co-defendant Larca and with Larca alone over a two-day period in February, 1972, four and a half years before the events relating to the charges in the case on trial. Visceglia testified that a deal was discussed to sell him 10 kilos of heroin, but it fell through when he could not

raise the necessary money. Visceglia's financier in the transaction was Paul Levy, who had been a co-defendant in the Verna-Visceglia case. Madonna was ultimately convicted on both the conspiracy count and the substantive violation and remanded immediately to jail. (Tr. 2096)

The Verna-Visceglia Case in New Jersey

After the *Madonna* trial, access was obtained to the minutes of the Verna-Visceglia hearing in New Jersey. (A. 261-571) After that pre-trial hearing, which had been the subject of the application to Judge Carter by Madonna's counsel, Visceglia's co-defendant, his Uncle Donald Verna, went to trial, was convicted, and appealed the conviction. The Court of Appeals for the Third Circuit reversed Judge Meanor's findings at the hearing, reversed the conviction, and dismissed the indictment due to the government's action in the case. The decision centered around Visceglia's activities as a defendant, represented by the same counsel as his co-defendant uncle, who was cooperating with the government while meeting with his uncle and defense counsel. (A. 263-65)

The minutes of the hearing, which had preceded the *Madonna* trial, revealed Visceglia had testified at that hearing, as had agents of the Drug Enforcement Administration and as Assistant United States Attorney. Contrary to the government's assertion that the material had been collateral, the Verna-Visceglia hearing minutes have proved what the government knew about Visceglia independent of the hearing itself. The minutes establish that the prosecutor knowingly permitted Visceglia to commit perjury at the *Madonna* trial.

The first area of Visceglia's perjury at the trial related to the contradictory portrayal of Paul Levy, who was the

other alleged participant in the Madonna prior similiar act. The government chose to argue in the District Court that there was no contradiction between Visceglia's description of Levy during the period 1971 through 1973 as his financier in a $200,000 narcotics transaction at the *Madonna* trial and, at the Verna-Visceglia hearing, as a "small fish" bookmaker during the same time-frame. These versions are contradictory and go directly to the issue of whether the prior similar act happened at all. At the hearing the D.E.A. agents and Rhonda Fields, the prosecutor in New Jersey, testified they had questioned whether Visceglia's cooperation should be continued. (A. 465-66) The government also knew Visceglia had vacillated as to whether he would testify against Paul Levy despite the fact that he maintained Levy's innocence. (A. 278, A. 283, A. 350, A. 439, A. 443, A. 451, A. 514). In addition, one agent later testified that Visceglia was a liar. Thus, the government was aware of Visceglia's perjurious nature when he took the stand at the Madonna trial.

The second area of Visceglia's perjury involves his testimony to the effect that his cooperation would be made known to the federal sentencing judge and to the state authorities. At the time of his testimony at the *Madonna* trial, Visceglia had already pled guilty to two A-3 narcotics felonies under New York State law and had been sentenced to one term of from zero to three years and to one term of 3 years to life, both sentences to run concurrently. In connection with these sentences, Visceglia testified that his cooperation was to be brought to the attention of the federal sentencing judge and the state authorities. (A. 108-09)

Visceglia's state sentences were the minimum that could have been imposed upon him in 1976 under New York State law, and the minimum was imposed because Visceglia's federal cooperation had already been brought to

the attention of the state sentencing judge.* As Justice Cohen wrote in his order denying Visceglia's motion to reduce his state sentence:

> Further, the sentence imposed resulted from a negotiated plea, and in light of the possible sentence which could have been imposed . . . on either one of the indictments, pled to by this defendant, it is quite clear that the reason for the Court's exercising it's discretion in the imposition of such a lienent [sic] sentence in this case, was the awareness that the defendant was co-operating with Federal and State authorities.

(A. 607-08) This consideration which Visceglia had already received by the time of the *Madonna* trial was not disclosed by Visceglia or the government.

Visceglia was also permitted to remain free on bail courtesy of the federal government and he was allowed to surrender to the Bronx authorities rather than be apprehended on a fugitive warrant. (A. 674) In addition to all this consideration, efforts were being made prior to the *Madonna* trial to reduce the beneficial State sentences after they were imposed. Indeed, a memo dated June 3, 1976, in Visceglia's attorney's file apparently recorded certain discussions which had taken place with Mr. Cooney. The memo states, in relevant part:

> Cooney said that under state law once a prisoner is serving his sentence the judge cannot change the sentence. Perhaps we can argue that Visceglie is serving the one to three year sentence and has not begun to serve the sentence of three years to life. Peter Grishman runs the narcotics unit for the Bronx D.A.'s office. Cooney also said he would write a letter to the Parole Board. Cooney and Shaky O'Neal told me that

* N.Y.P.L. §70.00 (McKinney 1973).

> Visceglie made some cases for the United States Attorney's office in New Jersey and apparently also cooperated with Nadjari.

(A. 765)

When Visceglia testified at the *Madonna* trial, both he and the government knew extraordinary efforts were being made to reduce his state sentences.

However, all of these measures were concealed from the defendant. This concealment was compounded when the prosecutor stated in his summation:

> You have all been told about their deals. *For the most part, all they get for their cooperation is a recommendation, an explanation and the extent of their cooperation, no specific recommendation. These things were mentioned in my opening.* They were brought out for the most part on the direct testimony. They were admitted to by the witnesses themselves on the stand. No witness in this case has been given immunity except for the half brother of one. Consider what they faced as they sit there or sat there on the witness stand. They are facing lengthy jail sentences and all hope—well, some hope not to go to jail. Others hope that their cooperation will be taken into account and that their sentence will be reduced in some way, but none of them know that that will happen.

(Tr. 1770) Emphasis added.

The government failed to respond to petitioner's assertion that there had been joint cooperative efforts with the state authorities after the imposition of the state sentences and before the *Madonna* trial to reduce Visceglia's state sentences. Moreover, the District Court did not address the issue of what consideration had been already received

by Visceglia prior to the *Madonna* trial as distinguished from what consideration he might expect in the future. It was the former which was concealed from the petitioner.

The third area of Visceglia's perjury concerned the period and extent of his cooperation. At the Madonna trial, Visceglia maintained he became an informant and cooperated with law enforcement for the first time after his arrest on July 17, 1975, in connection with the Verna-Visceglia case. Visceglia so testified on both direct and cross examination. (A. 107, A. 128, A. 134, A. 160-61) When he did so, Visceglia and the prosecutor knew that the answers were perjurious.

During the Verna-Visceglia hearing, several agents and the prosecutor who orginally handled the Verna-Visceglia indictment, testified that they knew Visceglia had been an informant in the Bronx. (A. 308, A. 329, A. 376, A. 470, A. 476) Visceglia himself testified at the Verna-Visceglia hearing that he had been an informant for Maurice Nadjari, the New York Special Prosecutor, since 1974. (A. 397) After his conviction, defendant obtained a letter from an Assistant District Attorney which confirmed that Visceglia had been cooperating with the Bronx District Attorney's Office since the Summer of 1973. The Office of the Special Prosecutor also confirmed that Visceglia had been an informant since the Fall of 1974. (A. 672) In the face of this patent conflict, the government concedes it was aware Visceglia had been cooperating with Bronx authorities since 1973, but claims its suppression of the truth resulted from of the operation of Visceglia's mind, that is, how Visceglia understood the question. (A. 653, A. 668-69) This statement is made, of course, without the benefit of any affidavit or testimony on the subject from Visceglia.

In addition, petitioner offered an affidavit of Frederick P. Heilfurth which suggests Visceglia was an informant

for the B.N.D.D., the predecessor agency to the D.E.A. (A. 603-05) Moreover, petitioner has produced two sworn affidavits from former New York City Police Department detectives which state that Visceglia had been a cooperating individual since 1963. (A. 586-87, A. 588-89) The government's response to this allegation is the plainly inadequate statement from the prosecutor that Visceglia has told him it was untrue.

The fourth area of Visceglia's perjury concerned the place of his arrest. On direct examination at the *Madonna* trial, Visceglia testified he was arrested in July, 1975, in Newark, New Jersey, in connection with the Verna-Visceglia indictment. (A. 107) Under cross-examination, he stated he had been arrested on White Plains Road in the Bronx, New York. (A. 157) When Visceglia testified he had been arrested either in Newark, New Jersey, or at home in the Bronx, he and the government knew those answers were false. The Verna-Visceglia hearing establishes that the government knew Visceglia had been arrested in the office of a Bronx Assistant District Attorney by pre-arrangement between the state and federal authorities. (A. 270-71, A. 308)

The government has also conceded the falsity of this fourth area of Visceglia's testimony. The prosecutor ascribes the prejury to confusion on the part of Visceglia, despite the fact that it was the prosecutor's question on direct examination which gave rise to the uncontradicted perjurious answer. There is, of course, no affidavit from Visceglia, and neither his nor the prosecutor's credibility on the subject can be tested without a hearing.

The fifth area of Visceglia's perjury concerned his receipt of money for his services as an informant. At the *Madonna* trial Visceglia was asked on cross-examination:

Are you receiving any benefits from the United States Government in the form of payments to you or your dependents of any money?

(A. 176-77)

Visceglia responded:

No, just for relocation purposes.

(A. 177)

The government in response to the motion below for the first time submitted Visceglia's informant file. It showed Visceglia was an undercover informant for the D.E.A. and that he had received at least one payment of $150 for information. (A. 688) Visceglia therefore lied on yet another fact which was solely within the possession of the government. Once again, the lie went uncorrected. The revelation of the payment of money for information would have provided petitioner with a new argument that Visceglia had a financial interest in testifying against Madonna.

Visceglia's five acts of perjury and the prosecution's failure to correct them were not the total extent of the wrong perpetrated at the trial. The prosecutor also failed to disclose evidence favorable to the defendant and then compounded his misconduct by misrepresenting to the District Court. At the time Visceglia took the stand at the *Madonna* trial, the government knew Visceglia had testified at the Verna-Visceglia hearing. Yet in clear disregard of its obligations under 18 U.S.C. §3500 and *Brady*, the prosecutor never informed the District Court of the existence of that testimony.

Visceglia lied in at least five instances at the *Madonna* trial, concealing, with the knowledge and help of the prosecutor, material which affected his credibility and his motives for testifying and which threw into doubt the prior similar act itself. The prosecutor stood by in silence while this occurred. The government misconduct did not end

there. Mr. Flannery conceded that he and the D.E.A. agents knew in advance of the *Madonna* trial that Visceglia had testified at the Verna-Visceglia hearing. Despite that, the prosecutor remained silent when defense counsel sought access to the sealed hearing minutes, and then actively misled the trial court when it was apparent the court did not understand what the hearing minutes contained.

POINT ONE

The Government's Knowing Use of Perjured Testimony in This Case Requires That the Judgment of Conviction Be Vacated and a New Trial Ordered.

1. *The Government's Knowing Use of Perjured Testimony Requires a New Trial Because There Was a Reasonable Likelihood the False Testimony Could Have Affected the Judgment of the Jury*

An essential protection to the defendant in a criminal case, as provided by the due process clause of the fifth amendment to the United States Constitution, is that a criminal conviction cannot be obtained by the knowing use of false evidence. That is because the requirement of due process:

> . . . is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. . . .

Mooney v. *Holhan*, 294 U.S. 103, 112 (1935).

In this case, the government witness Visceglia testified about a prior similar act with Madonna when the government was aware he had drawn a contradictory picture of his partner in the prior similar act, Paul Levy. Visceglia also testified his cooperation would be brought to the attention of state authorities when he and the government knew he had already received greater consideration than that. Visceglia also testified that he first became an informant in 1975. The government knew that was untrue. Visceglia swore under oath he was arrested at his home in the Bronx, and that, too, was known by the government to be false. Finally, Visceglia lied about receiving payment for information when the government was the payor. Nevertheless, the government failed to correct Visceglia's testimony. Madonna was, accordingly, denied due process of law.

In *Napue* v. *People of the State of Illinois,* 360 U.S. 264 (1959), the Supreme Court established certain vital principles applicable to cases where it is claimed the prosecutor knowingly used false testimony to obtain a conviction. First, it was estabilshed that such a conviction must fall whether the state solicits the false evidence or merely allows it to go uncorrected. Secondly, the rule that such a conviction is tainted applies even if the false testimony goes only to the credibility of the witness. Thirdly, a conviction must be reversed if there was any reasonable likelihood that the false testimony affected the fairness of the trial. *Giglio* v. *Urited States,* 405 U.S. 150 (1972).

These cases establish the essential principles under due process which warrant reversal of a conviction. First, the government must have solicited false testimony or allowed it to go uncorrected. The government elicited Visceglia's false testimony in five instances.

The second element which must be established is that the prosecutor knew or should have known of the false testimony of his witness. *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). Here the documents submitted by the petitioner and the government in the District Court clearly establish such knowledge.

Finally, the evidence must be material. Focusing on the materiality of the false evidence presented, the Supreme Court, in *United States* v. *Agurs*, 427 U.S. 97 (1976), held that a new trial is constitutionally required where the government knew or should have known it had presented perjured testimony at trial if there is *any* reasonable likelihood the false testimony could have affected the judgment of the jury. 427 U.S. at 103. In the case at bar, Visceglia's perjury was clearly material under the *Agurs* standard.

2. *A New Trial Is Required Because There Was a Reasonable Likelihood the Jury Was Affected by Visceglia's Perjured Testimony*

As part of the government's attempt to divert the District Court from the actual issues raised in this motion, the government argued that under the standards applicable in a case where there is merely newly discovered evidence and no alleged government misconduct, *United States* v. *Alessi*, 638 F.2d 466, 479 (2d Cir. 1980), or where there is negligent but inadvertent nondisclosure, *United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 427 U.S. 819 (1976); *United States* v. *Rosner*, 516 F.2d 269, 274-75 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976), Madonna would not be entitled to a new trial. However, those are not the standards applicable here.

There are two categories of cases where courts deviate from the proscribed "probability" test and permit new

trials based on a less exacting demonstration of the new evidence's materiality to the defendant's conviction. One line of cases turns upon the witnesses' commission of perjury with the government's knowledge; the other line of cases looks to the existence of prosecutorial culpability in suppressing or failing to disclose the evidence in question. *See United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 427 U.S. 819 (1976). In those cases, the government's actual knowledge of the falsity of the witness' testimony and the concomitant intentional government suppression of that knowledge and therefore of evidence useful to the defendant at trial "will mandate a virtual automatic reversal of a criminal conviction." 527 F.2d at 243 citing *Moore* v. *Illinois*, 408 U.S. 786, 797-98, 92 S.Ct. 25621, 33 L.Ed.2d 706 (1972); *Giglio* v *United States*, 405 U.S. 150, 154, 92 S.Ct. 763 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959). This is clearly such a case.

Here there was uncorrected, knowing perjury and suppression of the specifically requested Verna-Visceglia transcript. Even if it were Visceglia's credibility alone, that would be sufficient in this case to warrant a new trial. *Napue* v. *Illinois*, 360 U.S. 264 (1959).

The purposeful government concealment distinguishes this case from that of *United States* v. *James*, 609 F.2d 36 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). The differences between the situation in *James* and the case at bar are significant. In *James*, the government properly disclosed the existence of the prior testimony. In *Madonna*, the prosecutor did not. In *James*, the government sought to obtain the testimony. In *Madonna*, the prosecutor did not. In *James*, the judge would not release the transcript. In *Madonna*, Judge Meanor would have released it but Judge Carter was uncertain, due to the prosecutor's si-

lence, as to its possible relevance and did not, therefore, require its release. In *James*, the prosecutor's representation that the material was irrelevant was based on a representation made to him by another prosecutor with actual knowledge of the testimony. In *Madonna*, Mr. Flannery has stated he did not know what was in the hearing, but he represented it was collateral anyway. In *James*, accordingly, the failure to make disclosure of the testimony was unavoidable. In *Madonna*, it could have been avoided if the government had acted in a proper fashion.

These acts of prosecutorial misconduct make the standard applied to the testimony in *James* inapplicable. Instead, here the less stringent standard set forth in *United States* v. *Agurs*, 427 U.S. 97 (1976), is appropriate. A new trial is required if there is *any* reasonable likelihood the concealed evidence could have affected the judgment of the jury. The government, by calling Visceglia's testimony "critical" to Madonna's conviction, thereby established such a reasonable likelihood here, and a new trial should be ordered.

POINT TWO

The Facts Established Herein Do Not Justify the Conclusion That Appellant Is Entitled to No Relief and Therefore an Evidentiary Hearing is Warranted.

A Hearing Is Required to Fully Develop the Underlying Facts

Madonna alleged five specific instances where Nicholas Visceglia, a critical witness, committed perjury. The Assistant United States Attorney has conceded the government's knowledge of the falsity of some of its witness' responses. To avoid the consequences of its acknowledgment, the government has attempted to minimize the meaning of the false statements and has wholly failed to address

other of the allegations which have been made. Under these circumstances, Madonna is entitled to a hearing and the opportunity to establish that there was a reasonable likelihood the fairness of his trial was affected by the government's knowing use of Visceglia's perjured testimony. *See, e.g., Perkins* v. *Lel'evre,* 642 F.2d 37 (2d Cir. 1981), *aff'd,* after remand, slip op. 2d Cir. 10/21/82.

Unless the motions, files and records of the case conclusively show Madonna is entitled to no relief, he must be given a hearing. The determination as to whether to hold a hearing involves a twofold analysis: 1. whether the petitioner's allegations specifically delineate the factual basis of his claim, and 2. even where the allegations are specific, whether the records, files and affidavits are conclusive against the petitioner. *United States* v. *Taylor,* 648 F.2d 565 (9th Cir. 1981).

Visceglia perjured himself when he testified at Madonna's trial about the prior similar act with Madonna. At the *Madonna* trial Visceglia described Paul Levy as his financier in the prior similar act who apparently had connections at certain Harlem bars where he could expect to raise $200,000 on short notice. This description conflicts with Visceglia's portrayal of Levy as a small fish numbers guy during the Verna-Visceglia case. The antithetical positions on Levy become clear when one realizes that the time period of the prior similar act was within the conspiracy period of the Verna-Visceglia case. The transcript of the Verna-Visceglia hearing supports all of appellant's contentions concerning Levy's status; Visceglia's use of his potential as a witness against Levy if it served his ends, despite his earlier assertion of Levy's innocence, Visceglia's perjury concerning his place of arrest and Visceglia's perjury concerning the date of his first cooperation with the various state authorities. This latter fact is also

supported by correspondence from the Bronx District Attorney's Office and the Special Prosecutor's office. Indeed, proof in the form of affidavits from a retired New Jersey State detective by the name of Heilfurth and two former New York City detectives suggest that Visceglia cooperated as early as 1963.

Madonna's contentions about perjury concerning the consideration he had already received and the unusual steps being contemplated and taken to further reduce his sentence are irrefutably established by Judge Cohen's order, John Gross's memo and the Gross affidavit submitted for reimbursement. In addition, the special consideration Visceglia had already received in the form of government-sponsored adjournments and the notice he received of his fugitive status were supported by Agent Taylor's letter, Judge Cohen's order and the Verna-Visceglia minutes.

Finally, Visceglia lied when he testified at the *Madonna* trial that he had only received money from the government for relocation purposes. Visceglia's informant file, supplied by the government in its answering papers to this motion, establishes Visceglia, in fact, received a payment on March 1, 1976, of $150.00 for information.

Thus Madonna has set forth specific question and perjured answers. He also set forth the true answers to those questions, and he attached other sworn testimony, court records, affidavits, letters and memoranda which document the untruth of all of the contested answers. He has therefore clearly and specifically provided factual support for his claims. Accordingly, Madonna is entitled to a hearing unless the files and records of the case conclusively show that he is entitled to no relief. The files do not.

The government's answer to the motion to vacate the sentence includes affidavits from the Assistant United

States Attorney who prosecuted the *Madonna* case, John P. Flannery, II, Assistant District Attorney Peter Grishman, D.E.A. Agent John J. O'Neill, Stephen Harwood, Rhonda Fields and Vincent A. DeFillippis. Conspicuously absent from the response is a statement from the witness himself, Nicholas Visceglia. Nor does it contain any affidavit from John P. Cooney, the former head of the Narcotics Division of the Southern District, who was the prosecutor who recommended Visceglia to the Bronx District Attorney for his cooperation and who called him a "critical" factor in the conviction of Madonna. Cooney was also the government prosecutor who sought to reduce Visceglia's state sentences prior to the *Madonna* trial.

The government's answer concedes its knowledge of the falsity of Visceglia's *Madonna* trial testimony on the issues of the length and extent of Visceglia's cooperation and the place of his arrest. The government argues that the inferences drawn from the responses are mistaken or that Visceglia's answers were merely inadvertent and not perjurious. On the issue of the consideration Visceglia had received which was concealed from the defendant, the government is silent. The government instead contends Visceglia testified truthfully about what consideration he could expect in the future. On the contradictions about Paul Levy which implicate the prior similar act itself, the government does not even deny its knowledge of these inconsistencies, but argues that in its view, they are not really inconsistent. There has been no government response on the direct contradiction between Visceglia's *Madonna* trial testimony that he had been paid only for relocation and his informant file which establishes he had been paid for information.

The District Court, in denying the motion, repeatedly credited the government's arguments and discredited the

ones made by Madonna. As such it was erroneously treating the affidavits submitted by the government as part of the "files and records of the case." The Supreme Court observed in a similar case:

> It is true that they [appellant's allegations] are denied in the [government] affidavit filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way.

Walker v. *Johnston*, 311 U.S. 275, 286-87 (1941). Thus, where the government has even denied Madonna's allegations, the effect of those denials merely establishes the need for a hearing. The denials do not have the evidentiary effect of actually determining a disputed issue. However, here, the government has not so much flatly denied the allegations as ignored them or argued they were mistaken or misunderstood. Even if the government can rebut the inferences Madonna seeks to have drawn from conflicting court testimony and records or establish that some answers were misunderstood or wrong but not perjured, Madonna need not disprove all such possibilities to be entitled to a hearing. *Lindhorst* v. *United States*, 585 F.2d 361 (8th Cir. 1978).

In *Reagor* v. *United States*, 488 F.2d 516 (5th Cir. 1973), the Circuit Court held it was error for the district court to deny Reagor's motion without an evidentiary hearing where he argued that under *Giglio* v. *United States*, 405 U.S. 150 (1972), he would be entitled to a new trial if, in fact, the co-conspirator-turned-government witness did not accurately apprise the jury that the prosecution had made promises to him in return for his testimony. 488 F.2d at 517. In the case at bar, Madonna has done much more than in *Reagor*, because he has shown the actual

falsity of Visceglia's testimony, and the government has even conceded Visceglia's testimony was contrary to the truth and that the contradictions were known to the government.

A second aspect of the analysis that engaged the *Reagor* court was whether the witness' testimony was material to Reagor's conviction. The court in *Reagor* held that the testimony was "highly instrumental" in Reagor's conviction because without the witness, the government's case would have been based entirely on a web of circumstantial evidence and the fact that the heroin was found in the car in which the defendants were apprehended. 488 F.2d at 516. The parallel of the *Madonna* case to *Reagor* on this issue of materiality is a close one.

At the *Madonna* trial, the District Court had found the evidence against Madonna to be totally circumstantial. Indeed, as to those acts which the District Court recited as comprising the circumstantial evidence, Madonna had conceded he engaged in that specific conduct. Madonna's defense at trial had been solely directed to the intent with which he had performed those otherwise equivocal acts. Thus, Madonna presented testimony which sought to explain his actions in the context of an affair he, a married man, was having with another woman. Because the District Court agreed Madonna had put his intent in issue, it allowed Nicholas Visceglia to testify to a prior similar act with Madonna and his co-defendant Salvatore Larca. The importance of that testimony is apparent as it was the only direct evidence which connected Madonna to any heroin transaction.

However, Visceglia's testimony did something more than provide the only missing element, intent. Visceglia described a relationship between Salvatore Larca and Madonna which could not be gleaned from any other evidence in the case. In the 1972 transaction, Madonna was the boss

and Larca the underling. This created a pattern which the prosecutor used in summation to draw an analogy to the transaction charged in the case. The prosecutor argued:

> You can judge the relationship of Mr. Larca and Mr. Madonna in the February 1972 incident. Mr. Larca was the person who at that time was taking the risk for Mr. Madonna. He was the one who went out and made each of those five visits, waiting for the money to come in, and it was only Matthew Madonna who was there on the last spot when the money was going to be delivered, when the deal was through, to complain, 'What's wrong with you?'—because the heroin was moving through the streets, and the working relationship between these two men is something that you should consider.

(Tr. 1807-08). Such argument about Madonna's relationship to his co-defendant Larca would not have been possible without Visceglia.

Indeed, the government, in a letter dated March 22, 1977, from John P. Cooney to the District Attorney of Bronx County, described Visceglia's testimony as "critical in putting the lie to Madonna's well-orchestrated defense and resulted in his conviction." It is appropriate to consider such statements by the government when assessing the materiality of the witness' testimony to a conviction. *Teague* v. *United States*, 499 F.2d 1381 (7th Cir. 1974).

Visceglia's repeated perjury, together with the other matters, would have entitled the jury to discount his entire testimony. The case against Madonna would then have been solely circumstantial and Madonna's version of the events could have been given greater credence by a jury. *See Taylor* v. *Lombard*, 606 F.2d 371, 375 (2d Cir. 1979). Accordingly, Madonna is entitled to an evidentiary hearing.

POINT THREE

The Government's Failure to Disclose the Prior Sworn Testimony of Its Witness and the Existence of Evidence Favorable to the Petitioner and Detrimental to the Government's Key Witness Against Petitioner Requires a Reversal of the Conviction.

18 U.S.C. §3500 provides that a statement of a government witness in the possession of the United States shall be produced if it relates to the subject matter as to which the witness has testified. In addition, when a defendant has requested the prosecutor to produce specific information which is material to the case against him, due process requires that such production be made. *Brady* v. *Maryland,* 373 U.S. 83 (1963). *See United States* v. *Agurs,* 427 U.S. 97 (1976). In the case at bar, the Verna-Visceglia hearing contained both prior sworn testimony by Visceglia and other testimony by D.E.A. agents and an Assistant United States Attorney which had been requested by defense counsel, but which the prosecutor suppressed. That suppression requires the reversal of this conviction.

The government is constitutionally obligated to disclose evidence which serves solely to impeach a prosecution witness if the reliability of the witness may be determinative of guilt or innocence. *Giglio* v. *United States,* 405 U.S. 150 (1972). The evidence contained in the Verna-Visceglia hearing, including Visceglia's own prior sworn testimony, is favorable evidence within the meaning of *Giglio.* The Verna-Visceglia hearing and Visceglia's testimony provided the government with information which directly contradicts Visceglia's trial testimony and provides factual support for the defense contention that Visceglia had a motive to provide testimony against Madonna without regard for its veracity. Had the government prosecutor not misled the

Court by its silence and false comment that the material was collateral, Madonna could have impeached Visceglia with his own prior testimony and could have presented the jury with government agents whose testimony would have contradicted Visceglia's testimony. *See e.g., United States* v. *Zborowski,* 271 F.2d 661 (2d Cir. 1959).

The suppressed Verna-Visceglia hearing material established Visceglia's true assessment of Levy, his willingness to testify against Levy to avoid a remand where he otherwise said Levy was innocent, the D.E.A. agent's assessment of Visceglia's credibility, and the specific instances of perjury at the *Madonna* trial. Thus, as evidence impeaching the testimony of Visceglia, the hearing minutes must be classified as favorable to the petitioner.

This evidence, which would have permitted substantial impeachment of Visceglia's credibility, was material under the circumstances of this case. In *United States* v. *Agurs,* 427 U.S. 97 (1976), the test of materiality, where, as here, the evidence has been specifically requested by the defense, is that a new trial is required if its disclosure might have affected the outcome of the trial. *Agurs, supra,* at 104.

Evidence of Visceglia's perjury and contradictory testimony, as compared with the testimony of government agents, might have affected the outcome of this case. Visceglia's credibility was an important issue at trial, which otherwise involved only circumstantial evidence which Madonna explained through his defense. Visceglia was the only witness who provided unambiguous inculpatory evidence. Indeed, the government, described Visceglia's testimony as "critical." The evidence vitiating the prior similar act, establishing Visceglia's motives, impeaching Visceglia's credibility and providing negative character evidence, which was not disclosed, was, therefore, liable to affect the jury.

In sum, by failing to disclose evidence of Visceglia's own testimony and that of government agents and an Assistant United States Attorney which was demonstrably inconsistent with his testimony at trial, the government failed to afford the defense the tools to allow for an accurate evaluation of Visceglia. Where, as here, that witness was critical to the jury's determination of guilt, the non-disclosure denied Madonna due process of law and mandates a new trial.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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